89-1186

Supreme Court, U.S.
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CASE NO. ___________

IN THE
SUPREME COURT
OF THE
UNITED STATES OF AMERICA
OCTOBER 1989 TERM

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CHRISTINA PAGANO FLOCA
PETITIONER

V.

HOMCARE HEALTH SERVICES, INC.,
HOME HEALTH AND FAMILY CARE,
INC. and A. JACKSON HEALTH CARE
SYSTEMS,
RESPONDENTS

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED

1. WHETHER THE DISTRICT COURT'S DECISION IN A TITLE VII CASE IS TANTAMOUNT TO JUDICIAL LEGISLATION BECAUSE OF THE COURT'S IMPROPER SHIFTING THE BURDEN OF PROOF UPON THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES FROM THE EMPLOYER TO THE DISCRIMINATEE.

2. WHETHER THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT PETITIONER FAILED TO MITIGATE HER DAMAGES WHERE THIS FINDING IS PREDICATED ON THE ONE DEFENSE WITNESS WHO WAS NEITHER COMPETENT NOR QUALIFIED TO TESTIFY TO THE EXISTENCE OF SUBSTANTIALLY EQUIVALENT EMPLOYMENT OPPORTUNITIES FOR PETITIONER WHO HELD THE UPPER LEVEL MANAGEMENT POSITION OF DIRECTOR OF NURSING PRIOR TO HER DISCRIMINATORY FIRING.

3. WHAT DEGREE OF COMPETENT AND RELEVANT EVIDENCE IS REQUIRED OF THE

DISCRIMINATING EMPLOYER IN A TITLE VII DISCRIMINATION CASE TO SUSTAIN ITS BURDEN OF PROOF REGARDING THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES.

4. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT THE PETITIONER FAILED TO EXERCISE REASONABLE EFFORTS IN SEEKING SUBSTANTIALLY EQUIVALENT EMPLOYMENT WHERE THE FINDING IS PREMISED SOLELY UPON A DETERMINATION THAT THE UNCONTROVERTED TESTIMONY OF THE PETITIONER WAS NOT CREDIBLE.

5. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT ONLY NOMINAL DAMAGES WERE WARRANTED EVEN THOUGH THE COURT FOUND THAT THE PETITIONER HAD BEEN DISCRIMINATORILY DISCHARGED AS A DIRECTOR OF NURSING.

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The decision of the United States Court of Appeals for the Fifth Circuit was not published. Because the decision was not published, Petitioner attaches in the appendix hereto a full and complete copy of the decision.

## STATEMENT OF JURISDICTION

Petitioner seeks the review of the Judgment entered November 10, 1988 by the United States District Court for the Western District of Texas, Waco Division, as wellas the decision of the United States Court of Appeals for the Fifth Circuit, entered August 3, 1989 affirming the judgment. Petitioner timely filed her Petition for Rehearing in the Court of Appeals, which petition was denied September 5, 1989.

This Court has discretionary jurisdiction over this cause by virtue of 28 U.S.C., Section 1254(1). This cause also involves a federal question under 42 U.S.C., Section 2000e-5.

## STATUTORY PROVISION INVOLVED IN THIS CASE

The pertinent and relevant provisions of 42 U.S.C., Subsection 2000e-5(g) are as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No

> order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement of an individual as a member or a union, or the hiring, reinstatement or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspend or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national original or in violation of section 2000e-3(a) of this title.

Civil Rights Act of 1964 Subsection 706(g), as amended, **42 U.S.C., Section 2000e-5(g).**

## STATEMENT OF THE CASE

Petitioner brought her action pursuant to Title VII, **42 U.S.C., Section 2000e,** et seq. for discriminatory discharge based on sex (pregnancy). Two appeals to the 5th Circuit have been taken and this Petition for Certiorari arises from the decision in the second appeal sustaining the denial of back pay and post judgment attorneys fees.

### (i) COURSE OF PROCEEDINGS

The original trial in this matter was had before the Honorable Walter S. Smith,

Jr., U. S. District Court for the Western District of Texas, Waco Division, sitting without jury, on April 27, 28 and 29, 1988. The Court, on May 11, 1988 entered its Memorandum Opinion and Order finding that Petitioner had been subjected to a policy of discrimination predicated upon sex but awarded nominal damages only, finding that Petitioner had failed to satisfy her burden to mitigate damages. Petitioner appealed the Memorandum Opinion and Order of the trial court and the Honorable 5th Circuit Court of Appeals reversed and remanded the cause on the issue of denial of back pay. On remand, the Honorable Trial Court entered its order on November 10, 1988 and filed November 15, 1988, holding as follows:

> (1) "As pointed out in the Appellate opinion, Amanda Tatum testified that there were substantially similar jobs available to Plaintiff. The Court finds this testimony to be credible and to be adequate to meet the Defendant's burden of proof. The Court finds Plaintiff's testimony that there were no other jobs substantially equivalent to that which she had was not credible."

> (2) "Determining now that from a preponderance of the evidence there were substantially similar employment opportunities available, it follows that Plaintiff is only entitled to nominal damages."
>
> (3) "Plaintiff having not prevailed in this post appeal determination, she is not entitled to additional attorney's fees."

On August 3, 1989 the Court of Appeals entered a per curiam decision affirming the trial court's denial of back pay and attorneys fees. Petitioner thereafter timely filed her Petition for Rehearing with Suggestion for Consideration En Banc, which Petition was denied September 5, 1989.

(ii) STATEMENT OF FACTS

Mrs. Floca holds both a Bachelors and Masters Degree in nursing (TR. 8) and has completed half of the doctoral degree program at the University of Texas (TR. 10). Her Bachelors and Masters Degrees are both with honors (TR. 10).

Mrs. Floca began working at Home Health and Family Care as its Director of Nursing on December 12, 1980 (TR. 11, 15). As the

Director of Nursing she was to build a business and help the organization to grow (TR. 16), and her job would be largely public relations (TR. 24), and to foster business relationships with doctors and hospitals with the intended result of obtaining referrals of patients (TR. 25). Her duties also included the expansion of the business into new counties, the hiring of additional staff, training of the staff and supervision of nurses and nurses' aides on site (TR. 33).

After finding out she was pregnant, Mrs. Floca informed Mr. and Mrs. Jackson on Monday, February 2, 1981 that she, Mrs. Floca, was pregnant (TR. 55). Thereafter, things began to immediately change (TR. 56). Mrs. Jackson then informed Mrs. Floca that Mrs. Floca had ruined everything and that she, Mrs. Floca, would not be allowed to travel and represent the agency in the community since she was pregnant (TR. 58).

Mrs. Floca married her husband, Dr.

Frank Floca, on February 28, 1981 (TR. 57).

Mrs. Floca was informed by Mrs. Jackson that Mrs. Floca could continue working until June 1, 1981, or could work until August 1, 1981, if Mrs. Floca would train her own replacement (TR. 66, 71). No other reason was stated by Mrs. Jackson as to why Mrs. Floca could not continue to work past June 1st except for the pregnancy of Mrs. Floca (TR. 71, 72). Mrs. Floca, on May 22, 1981, gave notice of her resignation effective June 20, 1981 (TR. 146). The letter of resignation was not voluntary and termination was forced upon Mrs. Floca as a result of being prevented from doing her job (TR. 146).

The personnel policy concerning maternity leave in existence at the Defendant agency required as a predicate that the employee be a full-time employee that had been employed for one full year prior to eligibility for leave. (TR. 158). Mrs. Floca was subjected to the maternity

leave policy and was not eligible for the same (TR. 158). Mrs. Floca's final day of employment with the Defendant agency was May 28, 1981 (TR. 161).

Mrs. Floca filed her Charge of Discrimination with the Equal Employment Opportunity Commission on August 25, 1981 (R. Exc.). On November 22, 1985, the Equal Employment Opportunity Commission issued its Notice of Right to Sue Letter and the same was received by Mrs. Floca on November 25, 1985 (R. Exc., TR. 167).

Pursuant to written agreement, Mrs. Floca was to be paid a salary of $1,600.00 per month beginning December 12, 1980, and was to receive a $25.00 per month increase at the end of a three-month probationary period and an additional $25.00 per month raise on each anniversary date up to five years plus a cost of living raise in an amount to be determined by the local SMSA price index. Merit raises were to be granted for increasing and broadening the

corporation's business, increases in responsibilities, increases in professional skill of capacity to perform, and in ability to delegate to competent personnel. Further, Mrs. Floca was to receive two weeks paid vacation, seven paid holidays, fifteen days unpaid military leave, ten days sick leave and all other benefits accrued and incurred by other full time employees (Plaintiff's Exhibit 4, R. Exc.). Subsequent to her termination, Mrs. Floca sought reemployment at various locations in Temple, Waco and Killeen, Texas (R. 121), but was unable to secure a position of substantial equivalence. Subsequent to her unlawful termination, Mrs. Floca earned $1,782.50 through April, 1983 as a result of her efforts in private practice (TR. 172). Mrs. Floca further earned the sum of $1,500.00 for each of three semesters teaching at Baylor University (TR. 173). Mrs. Floca ceased her private nursing practice in February, 1986, upon entering

law school as a full-time student (TR. 174). The earnings of Mrs. Floca from her private nursing practice during the period April 1983 through February 1986 were "probably about $4,000.00" (TR. 175). No offer was made to Mrs. Floca to reinstate her to her former position with the Defendants (TR. 176).

After being terminated, Mrs. Floca sought employment by interviewing at several locations in the Central Texas area (R. Exc.). Mrs. Floca was not offered any job that would have been a substantial equivalent to the director of nursing for the Defendant agency. The search of Mrs. Floca for substitute employment was continuous until the time she was to have begun law school in 1985. Since she did not begin law school until 1986, she continued to do part-time work in group therapy and private practice until 1986 when her actual law school curriculum began (TR. Vol. 3 P. 5). In addition to the jobs sought as

listed in the Records Excerpts, Mrs. Floca made other calls in an effort to obtain substitute employment and reviewed the newspapers for purposes of attempting to locate substitute employment (TR. Vol. 3 P. 7).

## ARGUMENT AND AUTHORITIES

While it is clear that Title VII claimants have a duty to minimize their damages by seeking other substantially equivalent employment, this duty on the part of claimant does not amount to a shift of the burden of proof from the discriminating party. Floca vs. Home Health Care Services, Inc., 845 F.2d 108, 111 (5th Cir., 1988), Rasimas vs. Michigan Department of Mental Health, 714 F.2d 614 (6th Cir., 1983) cert. denied 466 U.S. 950 (1984), Sellers vs. Delgado Community College, 839 F.2d 1132 (5th Cir., 1988).

In Rasimas, the Court there stated:

> "Once claimant establishes a prima facie case and presents evidence on the issue of damages, the burden of producing sufficient evidence to establish the amount of interim earnings or lack of diligence shifts to the Defendant (Emphasis added) (Citations omitted). The Defendant may satisfy his burden only if he establishes that: (1) There were substantially equivalent positions which were available; and (2) the Claimant failed to use reasonable care and diligence in seeking such positions. Rasimas, 714 F. 2d at 623-624". [1]

To meet its burden of proof as to the issue of the affirmative defense of failure to mitigate damages, the Circuits consistently have held that an employer must

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[1] Other cases addressing this point have stated the Defendant has the burden to prove any failure by Plaintiff discriminatee to mitigate damages, and to be successful, he must show (1) that damage suffered by Plaintiff could have been avoided, i.e., that there were suitable positions available which Plaintiff could have discovered and for which Plaintiff was qualified, and (2) that Plaintiff failed to use reasonable care and diligence in seeking such position. EEOC vs. Pacific Press Publishing Association, 482 F. Supp. 1291 (N.D.Cal., 1979), affd, 676 F.2d 1272 (9th Cir., 1979), and further (the) burden is on the Defendant to prove that Plaintiff failed in the duty to mitigate, and the burden upon the Defendant is extremely high. Bonura vs. Chase Manhattan Bank, N.A., 629 F. Supp. 353 (Southern District of N.Y. 1986) affd 795 F.2d 276 (2nd Cir., 1986).

demonstrate that comparable work was available <u>and</u> Claimant did not seek it out. See <u>Hannah vs. American Motors Corp.</u>, 724 F.2d 1300 (7th Cir.), cert. denied, 467 U.S. 1241 (1984); <u>Rasimas</u>, 714 F.2d at 623-24; <u>Jackson vs. Shell Oil Company</u>, 702 F.2d 197, 201-02 (9th Cir., 1983).

In the case at bar, the Respondent employer failed to introduce sufficient competent evidence to meet its burden of proof as to the existence of substantially equivalent employment and that the Petitioner failed to use reasonable diligence in seeking substantially equivalent employment. As stated by the 5th Circuit, "[T]he employer must prove that 'employment was available in the <u>specific line of work</u> in which employee was engaged.'" <u>Floca, 845 F.2d at 111</u>, citing <u>Ballard vs. El Dorado Tire Company</u>, 512 F.2d 901, 906 (5th Cir., 1975) (Emphasis in original).

Thus the Respondent has the burden to

prove by substantial, competent and relevant evidence, (1) prospective employment is in fact substantially equivalent to that discriminatorily denied, (2) employment of substantial equivalence was in fact available at all relevant times, and (3) that the Petitioner failed to exercise reasonable diligence in seeking out such available jobs of substantial equivalence. The failure to offer sufficient, competent evidence defeats the affirmative defense asserted by Respondent. The conclusion by the District Court that the Respondent had met its burden of proof on the affirmative defense, and the Court of Appeals' affirmance thereon is error for the following reasons:

1. The conclusion of law of the trial court was based upon an improper factual finding and the trial court used the wrong legal standard concerning affirmative defenses.

2. Even if the evidence produced by

Respondent was competent, relevant and not hearsay, which Petitioner denies, Respondent still failed its burden since there was no evidence of any available job being in fact the substantial equivalent to a Director of Nursing, that discriminatorily denied Petitioner.

3. The finding of the trial court that "Amanda Tatum testified that there were substantially similar jobs available to Plaintiff" is not supported by substantial evidence.

4. The trial court's finding "Plaintiff's testimony that there were no other jobs substantially equivalent to that which she had was not credible" (emphasis added) amounts to an unlawful shifting of the burden of proof regarding the element of exercising reasonable diligence in seeking employment.

## I

## WHETHER THE DISTRICT COURT'S DECISION IN A TITLE VII CASE IS TANTAMOUNT TO JUDICIAL LEGISLATION BECAUSE OF THE COURT'S IMPROPER SHIFTING OF THE BURDEN OF PROOF UPON THE

## AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES FROM THE EMPLOYER TO THE DISCRIMINATEE.

As was the case in the original appeal to the 5th Circuit in this cause, the trial court has unlawfully shifted the burden of proof from the Respondent to prove that Petitioner failed to exercise reasonable diligence in searching for replacement employment. By the affirmance of the Court of Appeals, the Petitioner is now unlawfully saddled with the burden of proving her diligence rather than the Respondent proving that she was not diligent. The trial court's reference to the credibility of the Petitioner's testimony, coupled with the absence of any testimony from the Respondent on this point clearly identifies that the trial court indeed shifted the burden of proof unlawfully to the Petitioner. The Petitioner testified as to her extensive efforts in attempting to obtain substitute employment and having no job of substantial

equivalence presented to her. Ultimately she undertook private practice and a part-time teaching position at Baylor University, Waco, Texas, but these were not substantial equivalents to that discriminatorily denied. There was absolutely no evidence from Respondent which would have established that the efforts by Petitioner in this regard were less than reasonable. It is clearly erroneous to shift the burden of proof on any element of an affirmative defense asserted by Respondent to the Petitioner. <u>Floca</u>, supra.

The 5th Circuit's finding that the singular testimony of Amanda Tatum was "sufficient to support the above finding of the district court" (<u>Floca vs. Home Health Services, et al</u>, not published, dated August 3, 1989, See Appendix) is similarly clearly erroneous. Since Tatum did not offer any evidence on the issue of diligence in mitigation, there is no support for a finding that Respondent sustained its burden

and the Court of Appeals' affirmance of the trial court was error.

## II

## WHETHER THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT PETITIONER FAILED TO MITIGATE HER DAMAGES WHERE THIS FINDING IS PREDICATED ON THE ONE DEFENSE WITNESS WHO WAS NEITHER COMPETENT NOR QUALIFIED TO TESTIFY TO THE EXISTENCE OF SUBSTANTIALLY EQUIVALENT EMPLOYMENT OPPORTUNITIES FOR PETITIONER WHO HELD THE UPPER LEVEL MANAGEMENT POSITION OF DIRECTOR OF NURSING PRIOR TO HER DISCRIMINATORY FIRING.

As recognized by the 5th Circuit Court of Appeals, the only evidence produced by the Respondent on the issues contained within the affirmative defense was that of Amanda Tatum. The trial court found..."Amanda Tatum testified that there were substantially similar jobs available to Plaintiff." This statement by the trial court is clearly erroneous because it does not reflect properly the testimony of Amanda Tatum. Amanda Tatum did not testify as the existence of any substantially similar job, nor that of a Director of Nursing, nor as to their availability.

The entire testimony of Mrs. Tatum, both

direct and cross, on these matters is as follows:

On Direct Examination:

Q: If, during the time you had worked for the Jackson's, you had become unhappy with them or their treatment of you, would it have been difficult for you to find another nursing position in the Bell County area?

A: No, sir

Q: In your personal knowledge as a nurse that's been in the area for several years, is there any difficulty in finding a nursing position in the Bell County area?

A: No, sir

Q: Is there usually positions available?

A: Yes, sir

(TR 368-369)

On cross examination:

Q: When you were discussing about the nursing jobs in the area, you didn't find any difficulty -- you didn't find it difficult to obtain other employment outside the Jackson's agency, did you?

A: No, sir

Q: Are you talking about nursing positions, such as yourself, when you were saying that jobs are out there available?

> A: There's jobs for LVN's, RN's, supervisory. There's all different types of things that nursing--nurses can do.
>
> Q: Did you apply for any RN positions?
>
> A: No.

Q: Did you apply for any RN supervisory positions?

A: No, sir

Q: So you're not giving testimony about that, are you?

A: No, sir

> Q: So, your--your testimony is only regarding LVNs, because that's what you applied for and that's (what) you've had experience at?
>
> A: Most ads say "RN's" and "LVN's"
>
> Q: Pardon me?
>
> A: Most ads in the paper every day say "RN's" and "LVN's".
>
> Q: So, you're limit--you're limited then to whatever was advertised in the paper?
>
> A: No, sir.
>
> (TR 370-371)

Clearly, this testimony is neither competent nor relevant. The witness admitted she was not offering testimony on the

availability of supervisory (management) employment opportunities. Generic nursing positions for licensed vocational nurses are not the substantial equivalent to a managerial position of Director of Nursing. Similarly, this testimony fails to establish the availability of a job of substantial equivalence during the relevant time period, or the exercise of diligence by the Petitioner in seeking a position of substantial equivalence.

The 5th Circuit opinion, in the original appeal of this cause, recognized the difference between management and staff nursing employment opportunities. "In Ballard, this court required that the employer show that managerial work was available to the Plaintiff who worked in a managerial capacity for the Defendants." Floca, 845 F.2d at 111, 112. The uncontroverted evidence as to Petitioner's prior employment is that the Director of Nursing position involved the building of

the business, helping the organization to grow, improving public relations and fostering business relationships with doctors and hospitals with the intended result of obtaining referrals of patients. Petitioner's duties as Director of Nursing for Respondent also included the expansion of business into new counties, the hiring of additional staff, training of the staff and supervision of the nurses and nurses aides on site. In short, Petitioner was responsible for business development as well as the managerial duties of hiring, firing and supervising staff RNs and LVNs.

Tatum's testimony, truly "vague" as the 5th Circuit aptly noted, failed to establish that any specific prospective employer had such a "supervisory" position available for which Petitioner could have applied. At best Tatum's testimony is conclusory and not sufficiently specific to establish that any job position was available. Her testimony, being conclusory only, calls for conjecture

and speculation, and the missing elements of proof must be supplied by unlawful inference. Such an inference here is unreasonable and clearly erroneous. Since Tatum's testimony only raises a conjecture or speculation concerning available jobs, it follows that such testimony is insufficient to support the trial court's conclusion and the affirmance by the Court of Appeals.

Equally important is the fact that Mrs. Tatum was not competent to testify as to the availability or existence of jobs of substantial equivalence to that of a Director of Nursing. Tatum, as an LVN, could not have applied for, interviewed for, or accepted a job of substantial equivalence to that of Director of Nursing. She stated that she did not apply for a "supervisory" position. Since she could not have undertaken any steps in furtherance of a search for a substantially equivalent position to that discriminatorily denied Petitioner, and indeed was not qualified for

such a position, she was not competent to testify on this issue. It would have been no different for the Respondent to have placed a plumber or an airline pilot on the stand and testify that there were "supervisory" positions. Obviously, such testimony would not have been competent. Petitioner at trial objected to the testimony of Tatum as being incompetent, conclusory, and hearsay. Respondent did not offer Mrs. Tatum as an expert in the area of job placement. There was absolutely no foundation that established her personal knowledge as to relevant managerial opportunities available in the relevant area.

This testimony was not only irrelevant and incompetent, it was predicated upon impermissible hearsay. Tatum testified about "ads" which presumably referred to newspaper advertising. However, Respondent failed to identify where these ads appeared or to introduce the underlying documents. Since

Tatum did not testify about the availability of RN supervisory positions, any testimony concerning the availability of a substantially equivalent position is completely speculative. An oblique reference to "ads" does not overcome this fatal error. Moreover, the trial court as the trier of fact is required to disregard inadmissible, irrelevant and incompetent testimony. It is irrefutable that the Court's conclusion here is squarely founded on such inadmissable, irrelevant and incompetent testimony of Tatum. Since such evidence can only give rise to conjecture and speculation, it should have been disregarded. Bridges vs. Groendyke Transport, Inc., 553 F.2d 877 (5th Cir., 1977). The Court of Appeals should have reversed the trial court on this basis, and its failure to do so presented an unjust result under the law.

Further, Mrs. Tatum's testimony fails to address Petitioner's failure to exercise

diligence in her search for replacement employment. Thus there is no evidence presented on an essential element of Respondent's affirmative defense. The Court's ruling upholding the defense was clear error.

## III

## WHAT DEGREE OF COMPETENT AND RELEVANT EVIDENCE IS REQUIRED OF THE EMPLOYER IN A TITLE VII DISCRIMINATION CASE TO SUSTAIN ITS BURDEN OF PROOF REGARDING THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES.

Assuming, arguendo, that the testimony of Mrs. Tatum was competent, relevant and not hearsay, and that jobs were available, the testimony nevertheless fails to provide substantial evidence upon which the trial court's conclusion regarding the defendant's meeting their burden of proof may rest. Again, Tatum's singular testimony on this point was "There's jobs for LVNs, RNs, supervisory. There's all different types of things that nursing...nurses can do." (TR 370). Such testimony falls far short of

that required to establish that an available job, assuming it to be in fact available, meets the same factors and considerations as the job lost. Being a supervisory position is only one of the many factors to be considered in establishing substantial equivalence. In Sellers vs. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988), at 1138, it was held that a substantially equivalent position in the 5th Circuit was one that "affords virtual identical promotional opportunities, compensation, working conditions and status as the position from which the Title VII claimant had been discriminatorily terminated."

The bald, unsupported statement that "[t]here's jobs for ...supervisory" does not carry with it substantial evidence of the "virtually identical factors" requirement elaborated in Sellers. Tatum offered no testimony as to any specific job that was available or any evidence of pay, hours,

benefits, hiring, firing, training or advancement opportunities which Petitioner had as Respondent's Director of Nursing.

In its per curiam opinion the Court of Appeals recites the language of the district court on remand: "...Amanda Tatum testified that there were substantially similar jobs available to Plaintiff..." The Court of Appeals then concluded that, although "vague", it was "sufficient to support the above finding of the district court." (See Opinion - Appendix)

Without restating the argument again, Petitioner reiterates that the use of the single word "supervisory" cannot support the conclusion that substantially similar jobs were available. To draw such a conclusion from the Tatum testimony, the Court had to enhance and magnify by inappropriately inferring the missing proof in her testimony in order to fill its gaping holes and shortcomings. In the same manner the Court of Appeals had to infer the missing

testimony in order to conclude that Tatum's testimony was sufficient to support the trial court's conclusion. Petitioner submits that in so doing an injustice was done. The burden of proof of the affirmative defense remains upon the Respondent, but here the trial court was unlawfully allowed to supply the absent evidence on its own.

The Court of Appeals was limited to the language in the order after remand entered by the trial court to determine if error had occurred. Even if the testimony of Tatum was sufficient to sustain the Respondent's burden as to similarity and availability, which Petitioner most strongly and forcefully denies, the trial court did not find that Tatum's testimony established that Petitioner failed to use reasonable diligence in her search. Indeed, there is no evidence in the record upon which the trial court could conclude that Respondent sustained its burden of proving that

Petitioner failed to exercise reasonable diligence. Herein is a fatal error in the judgment. While the trial court did state that it found Tatum's "testimony to be credible and to be adequate to meet the Respondent's burden of proof," this statement referred only to the preceding sentence concerning her testimony of availability. There being no evidence produced by the Respondent on the issue of a failure to use reasonable diligence, the trial court's finding could not and did not include this element. In order to sustain their burden, Respondent had to prove by competent relevant evidence that Petitioner had failed in this regard. Floca, supra. This they did not do, and indeed with the evidence in the record, could not do. It is not material to this point that Petitioner's testimony as to her efforts were found by the trial court to be not credible. The burden of proof of Respondent is not established by the lack of credibility of

the Petitioner. Floca, supra.

## IV

## WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT THE PETITIONER FAILED TO EXERCISE REASONABLE EFFORTS IN SEEKING SUBSTANTIALLY EQUIVALENT EMPLOYMENT WHERE THE FINDING IS PREMISED SOLELY UPON A DETERMINATION THAT THE UNCONTROVERTED TESTIMONY OF THE PETITIONER WAS NOT CREDIBLE.

The District Court applied an erroneous standard of law, essentially reversing by judicial legislation the established law with respect to the burden of proof of affirmative defenses in Title VII litigation.

By finding that the Petitioner's testimony as to availability of jobs "was not credible" the trial court imposed a higher standard than is required in cases of this nature. The trial court's finding is tantamount to requiring Petitioner to have successfully obtained replacement employment in order to be found to have exercised reasonable diligence. This is not the applicable legal standard and is clearly

erroneous. The burden on the Petitioner was only to make reasonable efforts to mitigate damages. Discriminatees are not held to the highest standards of diligence. "The claimant's burden is not onerous, and does not require him to be successful in mitigation." Rasimus, 714 F.2d at 624. Moreover, the trial court's order of November 10, 1988 does not specify any reason why Petitioner is found to have not been diligent in her search. It only states that the court did not find credible Petitioner's testimony that no substantially equivalent employment positions were available. The singular reason the trial court found a lack of diligence in mitigation is a disbelief of Petitioner. Since the defense of failure to mitigate requires the Respondent to demonstrate a lack of diligence by Petitioner, the credibility, or more specifically the lack thereof, of the Petitioner's testimony in the eyes of the trial court is insufficient

to meet the Respondent's burden of proof. Whether or not the trial court believed the Petitioner, the Respondent has wholly failed to produce any evidence of a lack of diligence on her part. The finding of an absence of diligence on the part of Petitioner is clearly erroneous.

## V

## WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT ONLY NOMINAL DAMAGES WERE WARRANTED EVEN THOUGH THE COURT FOUND THAT THE PETITIONER HAD BEEN DISCRIMINATORILY DISCHARGED AS A DIRECTOR OF NURSING.

Once a trial court determines that a Petitioner's employment had been terminated as a result of unlawful discrimination, a presumption of entitlement to an award of back pay arises in favor of the discriminatee.

Section 706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C., Section 2000e-5(g) permits an award of back pay to victims of unlawful discrimination. While back pay is not an automatic remedy, it is equitable in nature and may be invoked in

the sound discretion of the court. Ford Motor Company vs. EEOC, 458 U.S. 219 (1982). Discretion, however, must be exercised in light of the large objectives of the act, and, "must be guided by 'meaningful standards' enforced by 'thorough Appellate review.'" Ibid (quoting Albemarle Paper Company vs. Moody, 422 U.S. 405 (1975).

> "Given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discriminations." Albemarle Paper Company, 422 U.S. at 421.

Having established that the only reason for denial of full back pay to Petitioner was the erroneous finding that the Respondent had met its burden of proof as to the affirmative defense of failure to mitigate, it is clear that the trial court abused its discretion in denying back pay and frustrated the central statutory purposes of eradicating discrimination.

Such abuse of discretion by the trial court herein is clearly erroneous.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. W-86-CA-028

CHRISTINA PAGANO FLOCA,
Plaintiff
V.
HOMCARE HEALTH SERVICES, INC., HOME
HEALTH AND FAMILY CARE, INC., AND
A. JACKSON HEALTH CARE SYSTEMS,
Defendants

## ORDER

On this date and on the 18th day of August, 1988, came on to be considered this matter as directed by the Fifth Circuit Court of Appeals. In its opinion that Court stated:

> ...we vacate the decision to deny back pay and remand to the district

> court for a determination of whether the defendants have met their burden of proving the availability of supervisory jobs substantially equivalent to a director of nursing.

Having afforded the parties an opportunity to present additional evidence and having considered same, and having considered their additional arguments and the original record, this Court determines that Defendants have met their burden and that the judgment entered need not be amended. The Court points out that the August 18, 1988 hearing was conducted without a court reporter and that the recording device used failed; therefore, there is no record.

As pointed out in the appellate opinion, Amanda Tatum testified that there were substantially similar jobs available to Plaintiff. The Court finds this testimony to be credible and to be adequate to meet the Defendants' burden of proof. The Court

finds Plaintiff's testimony that there were no other jobs substantially equivalent to that which she had was not credible.

In addition, Plaintiff's counsel stated in argument that Mrs. Floca had applied for other jobs. Upon inquiry from the Court as to whether those jobs were substantially similar, he responded in the affirmative.

This Court has already determined that Plaintiff did not exercise reasonable diligence in mitigating her damages. That determination has not been vacated.

Determining now that from a preponderance of the evidence there were substantially similar employment opportunities available, it follows that Plaintiff is only entitled to nominal damages.

Plaintiff having not prevailed in this post appeal determination, she is not entitled to additional attorney's fees.

SIGNED this 10th day of November, 1988.

(Signed)
Walter S. Smith, Jr.
United States District
Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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NO. 88-1640 and

89-1513

Summary Calendar

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CHRISTINA PAGANO FLOCA,

Plaintiff-Appellant,

V.

HOMCARE HEALTH SERVICES, INC., ET AL,

Defendants-Appellees

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Appeals from the United States District Court

For the Western District of Texas

(W-86-CA-028)

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(August 3, 1989)

Before GARWOOD, JOLLY and DAVIS, Circuit Judges.

PER CURIAM

When this Title VII sex discrimination case was before this court initially, we remanded because:

"The only evidence that supervisory positions were available for Floca was Amanda Tatum's testimony that there were jobs for LVNs, RNs and supervisory nursing positions in the county. We cannot say that the district judge relied on the defendants' one witness who testified about the availability of supervisory jobs to find that the defendants met their burden to prove the existence of jobs substantially equivalent to a director of nursing." Floca v. Home Health Care Services, Inc., 845 F.2d 108, 113 (5th Cir. 1988).

On remand, the district court expressly stated that:

". . . Amanda Tatum testified that there were substantially similar jobs available to

Plaintiff. The Court finds this testimony to be credible and to be adequate to meet Defendants' burden of proof. The Court finds Plaintiff's testimony that there were no other jobs substantially equivalent to that which she had was not credible."

Although Ms. Tatum's testimony is somewhat vague, we conclude it is sufficient to support the above finding of the district court.

Because Floca did not prevail on any significant issue remanded to the district court, the district court did not abuse its discretion in denying her attorney's fees for that work. See **Texas State Teacher's Assoc. vs. Garland Independent School District**, 57 U.S.L.W. 4383 March 28, 1989).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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CHRISTINA PAGANO FLOCA,

Plaintiff-Appellant,

V.

HOMCARE HEALTH SERVICES, INC., ET AL,

Defendants-Appellees

---

Appeals from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 8/3/89, 5 Cir., 198__

____ F.2d ____)

(September 5, 1989)

Before GARWOOD, JOLLY and DAVIS, Circuit Judges.

PER CURIAM

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing,

it is ordered that the petition for panel hearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of the said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

(Signature
United States District Judge

# OPINION OF THE 5TH CIRCUIT COURT OF APPEALS IN INITIAL APPEAL, DATED MAY 18, 1988

Christina Pagano FLOCA,
Plaintiff-Appellant,
V.
HOMCARE HEALTH SERVICES, INC., Home Health and Family Care, Inc. and A. Jackson Health Care Systems,
Defendants-Appellees

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No. 87-1468
United States Court of Appeals,
Fifth Circuit.
May 18, 1988

Nurse filed Title VII action alleging that she was discriminatorily terminated from director of nursing position because she had become pregnant. The United States District Court for the Western District of

Texas, Walter S. Smith, Jr., J., found the defendants liable under Title VII, but awarded nurse only nominal damages. Nurse appealed. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) nurse did not fail to mitigate her damages because she did not seek a registered nurse staff position after her termination, since job as registered nurse was not substantially equivalent to job as director of nursing, and (2) nurse was not entitled to front pay when she voluntarily removed herself from the job market to enter school to learn a new career.

Affirmed in part; vacated and remanded in part.

1. Civil Rights

Title VII claimants whose claim is based on loss of their job have a duty to minimize their damages by seeking other suitable employment. Civil Rights Act of 1964,

Section 701 et seq. 42 U.S.C.A., Section 2000e et seq.

2. **Civil Rights**

Once a Title VII plaintiff who has been discharged has made out a prima facie case of discrimination and has presented evidence on damages, burden of proof shifts to employer to prove that substantially equivalent positions were available and that the plaintiff failed to use reasonable diligence in seeking those positions. Civil Rights Act of 1964, Section 701 et seq., 42 U.S.C.A. Section 2000e et seq.

3. **Civil Rights**

Duty of a Title VII claimant to mitigate damages requires only that the claimant accept substantially equivalent employment; "substantially equivalent employment" is employment that affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and

status as the position from which the Title VII claimant has been discriminatorily terminated; two jobs are not "substantially equivalent" merely because they offer similar salaries. Civil Rights Act of 1964, Section 701 et seq., 42 U.S.C.A. Section 2000e et seq.

4. **Civil Rights**

Mitigation duty of a Title VII claimant who has been terminated generally requires only that the claimant seek employment substantially equivalent to the job that was wrongfully terminated; the duty is not to accept a job substantially equivalent to jobs previously held. Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. Section 2000e et seq.

5. **Civil Rights**

Title VII claimant who was discriminatorily discharged from position as director of nursing was not required to

accept a job as a staff nurse, in order to satisfy her duty to mitigate damages; job as a registered nurse was not substantially equivalent to job as a director of nursing. Civil Rights Act of 1964, Section 701 et seq., 42 U.S.C.A. Section 2000e et seq.

6. **Civil Rights**

District court wrongly applied burden of proof on issue of mitigation of damages on Title VII claimant, where major reason given for finding failure to mitigate was that claimant's testimony that she could not find comparable work was not credible; lack of credibility of claimant's testimony was insufficient to meet defendants' burden of proof on the issue. Civil Rights Act of 1964, Section 701 et seq., 42 U.S.C.A. Section 2000e et seq.

7. **Civil Rights**

Successful Title VII claimant was not entitled to front pay, where she voluntarily

removed herself from the job market to enter school to learn a new career. Civil Rights Act of 1964, Section 701 et seq., 42 U.S.C.A. Section 2000e.

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Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, WILLIAMS and DAVIS, Circuit Judges.

THORNBERRY, Circuit Judge:

Appellant, Christina Pagano Floca, successfully proved employment discrimination in her Title VII suit. She appeals, however, because the district court declined to award front pay and back pay and awarded only nominal damages. Because we believe the district court wrongly applied the burden of proof on the issue of mitigation of damages and erroneously determined that a job as a registered nurse is substantially equivalent to a job as a

director of nursing, we vacate and remand on the issue of the denial of back pay. We affirm the denial of front pay, however, because Floca voluntarily removed herself from the job market to enter school to learn a new career.

## I

Christina Pagano Floca began working for Home Health and Family Care (the "Agency") as its Director of Nursing on December 12, 1980. She was 28 years old, had a Masters Degree in Nursing, and had completed half of the requirements for her doctoral degree at the University of Texas. Her job duties were largely public relations, but also included hiring hospital staff, training the staff, and supervising nurses and nurse's aids. Prior to this job, Floca had worked as a staff nurse in several hospitals. She had never previously worked as a nursing director.

In early 1981, Floca discovered that she was pregnant. She informed her boss, Mrs. Jackson, of the pregnancy on February 2. Jackson respondent by informing Floca that she would no longer be able to represent the Agency in the community. Jackson further told her that she could continue to work only until June 1, or until August 1 if she would train her own replacement. No reason other than the pregnancy was given as to why Floca could not continue to work. Floca resigned on June 20, and her letter of resignation stated that she did not leave voluntarily. She was not eligible for the Agency's maternity leave policy, which required at least one year of prior full-time employment.

Floca filed a Charge of Discrimination with the Equal Employment Opportunity Commission (the "EEOC") on August 25, 1981. The EEOC issued its Notice of Right to Sue

Letter on November 22, 1985. Thus, Floca filed this Title VII action.

The case was tried before the district court without a jury, in April 1987. In May 1987, the court issued its memorandum opinion. The district judge found that "it would be difficult to create a maternity leave policy which would impose a harsher penalty on employees" than the Agency's. He also found that after Floca had established her prima facie case by proving the maternity policy's discriminatory effect on women, the defendants had been unable to present any evidence justifying the policy. Additionally, the judge found that Floca's pregnancy was a "substantial motivating factor" in the decision to fire her. Thus, the district judge held that the defendants were liable under Title VII. The defendants do not appeal this decision.

Although the district judge found the

defendants liable under Title VII, he nonetheless awarded Floca only nominal damages. Regarding damages, the judge wrote:

> The Plaintiff also seeks an award of back pay in this suit. In order to be entitled to back pay an employee must make a "reasonable effort" to find other suitable employment. 42 U.S.C. Section 2000e-5(g).... In the present case, Mrs. Floca testified that she made a reasonable effort to seek other employment, but that she could not find comparable work. The Court, however, finds that Plaintiff's testimony that she used reasonable diligence to find other employment is not credible. Additionally, the court further finds that Mrs. Floca voluntarily removed herself from the job market in order to begin and raise a family. As such, the Court is of the opinion that an award of back pay is inappropriate because Plaintiff has completely failed to mitigate her damages.
>
> ... In this suit, the Court believes an award of front pay is not proper for the same reasons stated in denying the Plaintiff back pay.

Floca appeals the denial of back pay and front pay.

## II

[1] Back pay is awarded to put victims of unlawful discrimination in the position in which they would have been but for the discrimination. Sellers vs. Delgado Community College, 839 F.2d 1132, 1136 (5th Cir. 1988). In Albemarle Paper Co. vs. Moody, 422 U.S. 405, 95 S. Ct. 2362, 2370-71, 45 L.Ed.2d 280 (1975), the Supreme Court held that although awarding back pay is discretionary, such discretion must be exercised in light of the objectives of Title VII. The purposes of Title VII are to achieve equality of employment opportunity and to make persons whole for injuries suffered on account of unlawful employment discrimination. Id 95 S. Ct. at 2371-72. It is clear, however, that Title VII claimants have a duty to minimize their damages by seeking other suitable employment. Sellers, 839 F.2d at 1136.

[2] Once a plaintiff has made out a prima facie case of discrimination and has presented evidence on damages, the burden of proof shifts to the defendant to prove that substantially equivalent employment positions were available and the claimant failed to use reasonable diligence in seeking those positions. Sellers, 839 F.2d at 1138; Rasimas vs. Michigan Department of Mental Health, 714 F.2d 614, 623 (6th Cir. 1983).

The trial judge based his determination that Floca had failed to mitigate damages on three factors: his conclusion that Floca's testimony about her efforts to find other work was not credible, his fact determination that she removed herself from the job market to raise a family, and evidence that she could easily have found a nursing job. Floca contends that the conclusion that she could easily have found

a nursing job is irrelevant, because a nursing job is not substantially equivalent to her supervisory job with the defendant. Also, she argues that the judge improperly placed the burden of proof on the mitigation issue on her. Additionally, she states that the trial judge improperly took judicial notice of the availability of nursing jobs.

Floca testified that she sought various job positions, but that she would not accept a position as a registered nurse (RN) because it would be frustrating and underpaid. She asserts that an RN staff position clearly is not e substantial equivalent to her previous job, which involved hiring, firing, training, and supervising staff nurses.

The defendants assert that they proved the availability of other job opportunities. One witness testified that there was no difficulty finding nursing positions in the

Bell County area and that there were jobs for licensed vocational nurses (LVNs), RNs and supervisory nursing positions. Another witness testified that she could have obtained employment as an RN in 1981 in the Bell County area. The defendants also note that although Floca stated that she would not accept a position as a registered nurse (RN) because it would be frustrating and underpaid, she had previously worked as a staff nurse on several occasions after receiving her masters decree.

[3-5] The duty to mitigate requires only that the claimant accept "substantially equivalent employment." Sellers, 839 F.2d at 1136-38. Substantially equivalent employment is employment that "affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the Title

VII claimant has been discriminatorily terminated." Id. at 1138 (emphasis added) Two jobs are not "substantially equivalent" merely because they offer similar salaries. Id.; Williams vs. Albemarle City Board of Education, 508 F.2d 1242, 1243 (4th Cir.1974). The employer must prove that "employment was available in the specific line of work in which employee was engaged." Ballard vs El Dorado Tire Co., 512 F.2d 901, 906 (5th Cir. 1975) (emphasis in original). In Ballard, this court required that the employer show that managerial work was available to the plaintiff who worked in a managerial capacity for the defendant. Id. In Ford Motor Co. vs. E.E. O. C., 458 U.S. 219, 102 S. Ct. 3057 n. 14, 73 L.Ed.2d 721 (1982), the Supreme Court stated that the claimants are not required to take lesser or dissimilar work. Claimants also are not required to take a demotion or a demeaning

position. Id. 102 S. Ct. at 3065. Additionally, although the personal characteristics of the claimant, including prior work experience, may have some effect on the type of job the claimant must accept, the mitigation duty generally requires only that the claimant seek employment substantially equivalent to the job that was wrongfully terminated. The duty is not to accept a job substantially equivalent to the jobs previously held. Thus, because Floca was wrongfully terminated from a supervisory position, she would not be required to accept a job as a staff RN.

[6] The only evidence that supervisory positions were available for Floca was Amanda Tatum's testimony that there were jobs for LVNs, RNs and supervisory nursing positions in the county. We cannot say that the District judge relied on the defendants' one witness who testified about the

availability of supervisory jobs to find that the defendants met their burden to prove the existence of jobs substantially equivalent to a director of nursing. Rather, the opinion shows that the judge thought that Floca had a duty to accept a job as an RN. He stated, for example, that "[t]he evidence is, the Court finds, and the Court knows anyway, that there were nursing jobs available...."[1] Additionally, the district judge's opinion appears to incorrectly place the burden of proof on the plaintiff on this issue. The major reason given for the fining of failure to mitigate was that the judge did not believe Floca's testimony that she could not find comparable

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[1] Floca asserts that this language shows that the district court improperly took judicial notice of the availability of nursing jobs. However, the words "and the Court knows anyway" appear to be merely an off-hand comment and do not indicate that the judge relied on his personal knowledge in reaching his decision.

work. The lack of credibility of Floca's testimony, however, is insufficient to meet the defendants' burden of proof on this issue. Thus, we vacate the decision to deny back pay and remand to the district court for a determination of whether the defendants have met their burden of proving the availability of supervisory jobs substantially equivalent to a director of nursing.

## III

[7] Floca next contends that the district court erred in failing to award front pay. Front pay is a remedy for the post-judgment effects of discrimination. It compensates the plaintiff for lost income from the date of the judgment to the date the plaintiff obtains the position she would have occupied but for the discrimination. Front pay is awarded to meet the goal of

Title VII to make whole the victims of discrimination. Front pay, however, is governed by the district court's discretion and is not always appropriate. Shore vs. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985). Whether it should be awarded depends on whether it will help meet the goals of Title VII. Id.

Floca began law school before the judgment in this case was entered. The defendants argue that she therefore could not suffer any future harmful effects of the 1981 discrimination. The Eleventh Circuit has held that when a person enters law school, that person is no longer "ready, willing, and available for employment". Miller vs. Marsh, 766 F.2d 490, 492 (11th Cir. 1985); see also Taylor vs. Safeway Stores, Inc., 524 F.2d 263, 268 (10th Cir.1975) ("[W]hen an employee opts to attend school, curtailing present earning

capacity in order to reap greater future earnings, a back pay award for a period while attending school also would be like receiving a double benefit."). Thus, the court held that the district court was within its discretion in not awarding the claimant damages for that period.

We agree with this reasoning. The time a person spends in school learning a new career is an investment for which future benefits are expected. The student is compensated for the time in school by the opportunity for future earnings in the new career and thus suffers no damages during that period. To allow front pay for this period would compensate the person twice. Therefore, the district court was clearly within its discretion in denying damages for the period after Floca entered law school. Her opportunity for future earnings suffices to make her whole, thus meeting the

goal of Title VII.

## IV

For the reasons stated in this opinion, we VACATE the judgment denying back pay and REMAND for a redetermination of whether an award of back pay is proper. We AFFIRM the denial of front pay.

# CERTIFICATE OF SERVICE

I hereby certify that on December 1, 1989, true and correct copies of the original submission of the Petition for Writ of Certiorari, along with the Appendix thereto, were mailed to opposing counsel by certified mail, return receipt #P568 370 399. Further, I hereby certify that on January 16, 1990, true and correct copies of the re-submission of the Petition for Writ of Certiorari, along with the Appendix thereto, were mailed to opposing counsel by certified mail, return receipt #P 445 716 811.

JON R. KER

## NOTARIZED STATEMENT

JON R. KER, of lawful age, being first duly sworn, upon his oath states as follows:

1. That I am a member of the Bar of the United States Supreme Court.

2. That in conformity with the Certificate of Service attached to the Petition for Writ of Certiorari, the Petition for Writ of Certiorari was mailed by U. S. Mail, first class, postage prepaid, properly addressed, to the Clerk of the Supreme Court, within the time allowed for filing. Specifically that the same was deposited within the U. S. mails on December 1, 1989.

3. To my knowledge, the mailing of the Petition for Writ of Certiorari took place on December 1, 1989 and that such date of mailing is within the permitted time for filing of the same.

4. Further, in conformity with said

Certificate of Service attached to this Petition for Writ of Certiorari, said Petition was re-submitted by U. S. Mail, first class, postage prepaid, properly addressed, to the Clerk of the Supreme Court, within the time allowed for same. Specifically, the same was deposited within the U. S. mails on January 16, 1990.

5. To my knowledge, the mailing of the re-submission of the Petition for Writ of Certiorari took place on January 16, 1990 and that such date of mailing is within the permitted time for filing of the same.

Further affiant saith not.

JON R. KER

SUBSCRIBED AND SWORN TO before me by the said Jon R. Ker on this 16th day of January, 1990.

Janice Stewart

Notary Public, State of Texas

JANICE STEWART
Notary Public
STATE OF TEXAS
My Comm. Exp. 07/13/93